wrong principle or that the Lower Court failed to take into consideration any matters which it was required to consider under the provisions governing the exercise of such discretion. I am satisfied that in this case the learned District Judge fully considered all necessary matters.

Solicitors for the Appellant—*Allen & Gledhill.*

Solicitors for the Respondent—*S. Fung.*

[APPELLATE CRIMINAL JURISDICTION]

SPROULE, Ag. C.J., THORNE and TERRELL, JJ.

REX v. LIM AH SENG.

[SINGAPORE FIFTH ASSIZES CASE No. 19 of 1931]

Confession—Evidence Ordinance, Ss. 24, 25, 26—Criminal Procedure Code, Ss. 123, 261—Inadmissibility of Statement—"volunteered" and "voluntary" statements distinguished.

In order to render a confession admissible in evidence, a statement must be volunteered, not merely voluntary.

The rules and form prescribed by the Criminal Procedure Code for the recording of a confession of an accused person must be strictly adhered to and failure to follow the procedure so laid down will vitiate the confession or statement.

A confession containing answers to a set of questions in the nature of a cross-examination is inadmissible.

The accused, Lim Ah Seng, was tried on the 14th September 1931 before Stevens, J., on a charge of murder of one Thomas William Gunter and convicted of the same on the 15th September 1931. In the course of the trial a question was raised as to the admissibility of a confession made by the accused and the point was reserved under Section 312 of the Criminal Procedure Code for the consideration of the full Court. The Magistrate by whom the confession in this case was recorded, after having satisfied himself that no inducement, promise or threat had been held out to the accused, proceeded to interrogate him as follows:—

> "Do you want to confess?" to which the latter replied—"I am in your hands, anything you ask, I am prepared to answer. Otherwise I say nothing."

Held, the statement made by the accused in these circumstances though voluntary was not volunteered and therefore inadmissible.

The learned Magistrate then proceeded to address the accused a number of questions as to the circumstances of the death of Gunter, etc.

Held, such questions were improper as being in the nature of a cross-examination and the confession based on the answers thereto was wrongly admitted.

Vaux, for the accused.

Deputy Public Prosecutor, for the Crown.

SPROULE, Ag. C.J. We delivered oral judgments in this case, but are invited to record our reasons for reproduction in the law reports.

We had to decide a point reserved by Stevens J. regarding the admissibility in evidence of a confession by the Accused. We held that it was inadmissible; but we refused to quash the conviction upon the ground that there was ample evidence to justify it, apart from the confession.

We rejected the confession because it was clearly not volunteered by the Accused, and was moreover vitiated by what amounted to unfriendly and improper cross-examination by the recording Magistrate.

Some years ago, in consequence of the decision of a Full Bench in a similar case heard in Penang, instructions and a form were carefully drafted for the guidance of Magistrates, and these are in the great majority of cases happily and scrupulously followed by Magistrates.

In the present case, however, sections 24 to 26 of the Evidence Ordinance, and section 123 and other relevant sections of the Criminal Procedure Code, as well as the instructions and form abovementioned, were all completely ignored by the recording Magistrate. He apparently preferred to go by the light of nature and such recollection as he retained of the principles relating to the recording of such statements by an accused person.

In case of homicide, and therefore of life and death, such neglect or defiance of rules laid down for the guidance of Magistrates is strongly to be deprecated.

In the result, the Magistrate in this case satisfied himself that the Prisoner's statement was not induced by threat or coercion or promise of reward, and seems to have thought that no more was required of him. But it was his first duty to assure himself, that the statement to come was not only voluntary but also volunteered. How he interpreted that requirement of the law—if, indeed, it occurred to him; and his own record

throws doubt upon that hypothesis—was to propound the unhappy question to the Prisoner, *not*, "Do you desire to make a statement?" *but* "Do you want to make a confession."

The Prisoner replied:

> "I am in your hands. Anything you ask, I am prepared to answer. Otherwise I say nothing."

That was, or should have been, the end of the matter, since it was quite clear that the Prisoner was not disposed to volunteer any statement, let alone a confession. He should have been sent away at once.

Our Magistrate, however, proceeded to examine and cross-examine him. The Prisoner answered voluntarily, and the Magistrate thought that was enough. He asked most improper questions as to the nature of the weapon used and the intention of the Prisoner, and so on.

In my opinion the only questions which may be lawfully propounded in such cases are those that tend merely to assist the Prisoner by making his meaning clearer; always presupposing that the statement is not only voluntary but volunteered.

For these reasons we all agreed in rejecting this statement as inadmissible in evidence.

THORNE, J. The accused was convicted of the murder of one Thomas William Gunter at Wilkie Road, Singapore on the night of the 5th day of July 1931.

The matter came before the Court upon a question of law which had arisen in the course of his trial, and was reserved under Section 312 of the Criminal Procedure Code.

Counsel for the accused contended at the trial that a confession adduced in evidence was not admissible for the reason that it was elicited by a series of questions addressed to the accused by a magistrate.

This objection was overruled, and the confession admitted in evidence as Exhibit "D." The confession omits the memorandum required by Section 123 of the Criminal Procedure Code. but the magistrate who took the confession was called as a witness for the prosecution, so that the omission does not appear to be a matter of any importance.

Under the provisions of Section 26 of the Evidence Ordinance no confession made by any person who is in the custody of a police officer, unless made in the immediate presence of a magistrate, can be proved against such person.

Provision is made by Section 123 of the Criminal Procedure Code for the recording by a magistrate of any statement or confession made to him at any time before the commencement of the enquiry or trial. By subsection 3 of this section, such statement or confession is required to be recorded in the manner prescribed for recording evidence in Section 261 of the Criminal Procedure Code, which in turn refers to the provisions, of Section 244. Subsection 3 prohibits the recording by a magistrate of any such statement or confession unless upon questioning the person making it, he has reason to believe that the confession is made voluntarily. The provisions of these sections read together may prove a little confusing. I am of opinion that upon an accused person being brought before a magistrate to make a statement or confession the proper course for the magistrate is to address to the accused person such questions as he regards as nesessary in order to satisfy himself that the accused person has come before him voluntarily. He must be satisfied that the act of the accused is entirely one of his own volition, in addition of course to satisfying himself that no inducement promise or threat has been made to the accused person.

Having satisfied himself with this the magistrate should then record any statement which the accused person volunteers, and should refrain from asking further questions of the accused other than such as may be necessary to explain any statement he makes, or to ensure that the magistrate correctly understands what the accused has said.

I now turn to the confession in this case. The confession begins with a short statement by the accused in the course of which he says he decided to confess when the Inspector asked him that morning if he was ready to go before a magistrate, and that no inducement, promise or threat had been made to him. Then follows this question by the magistrate:—

> "Do you want to confess?" to which the accused answered, "I am in your

hands, anything you ask, I am prepared to answer. Otherwise I say nothing."

In my humble opinion at this stage the magistrate should have sent the accused away and recorded nothing further.

Instead of so doing, the magistrate proceeded to address the accused a number of questions as to the death of the European, Gunter, and as to the circumstances of his death, the intention with which the accused stabbed him, and the nature of the instrument which the accused used, etc.

This set of questions was in the nature of a cross-examination, and was, in my view, improper.

I was of opinion, therefore, that the confession Exhibit "D" was wrongly admitted in evidence by the learned trial judge. There appeared to me however ample evidence *aliunde* to warrant the conviction of the accused and under Section 167 of the Evidence Ordinance it is competent for this Court to hold that on the improper admission of this evidence there was independently thereof sufficient evidence to justify the verdict of guilty.

I am of opinion that in this case there is no reason for this Court to interfere with the verdict.

TERRELL, J. By the combined effect of Section 24 of the Evidence Ordinance and Section 123 of the Criminal Procedure Code there are, apart from questions of form and procedure, two essential conditions which must both be complied with before a statement or confession can be admitted in evidence. They are (1) that no inducement, threat or promise has been made to the accused person, and (2) that the statement is made voluntarily.

It is usual and proper that the magistrate before whom the statement is made should elicit by question and answer that both conditions have been complied with. He is in fact required by Section 123 of the Criminal Procedure Code to record a certificate to the effect that the statement was made voluntarily. This certificate was omitted but the learned magistrate gave *viva voce* evidence to the effect that the statement was voluntarily made and it was not argued before us that the omission of the certificate was a defect that could not be cured.

There can be no doubt on the evidence that there was no threat, inducement or promise of any kind. We also have the sworn evidence of the learned magistrate that the accused's answers to the magistrate's questions were made voluntarily. In my view there is an essential distinction between a person being willing to make a statement and being merely willing to answer questions put to him in cross-examination.

An examination of Exhibit "D" (the confession) illustrates the distinction. The learned magistrate after ascertaining that there had been no inducement, threat or promise, said to the accused "Do you want to confess?" He should have asked "Do you wish to make a statement?" Anyway, the accused answered:—

> "I am in your hands. Anything you ask, I am prepared to answer. Otherwise I say nothing."

The learned magistrate then records "If 'voluntarily' is synonymous with 'willingly' I am convinced that the accused is prepared to make his statement voluntarily." He then proceeds to cross-examine the accused and records his answers.

I think the learned magistrate has himself indicated in what way the statement was not voluntary. The answers to the cross-examination were no doubt given willingly and the accused was quite properly warned that he need not answer any questions. But there can only be one answer to the question "Did the accused make a statement voluntarily?" and that answer must be in the negative, and it is expressly recorded that if he had not been cross-examined he would have made no statement whatever.

It may be that if an accused person not only expresses his willingness to answer any question but invites being asked the question, it might be permissible to put questions and record the answers. It is always the duty of the magistrate to put any question which might help to explain any statement which has been made, but in the present case the learned magistrate went much further than this. He cross-examined the accused not only about the death of the murdered man but asked the accused questions about his

motive in stabbing him and the weapon used. Even if the accused had unreservedly expressed his willingness to be questioned I do not think that any question beyond "Do you know anything of the death of this European?" would have been permissible except perhaps subsequent questions put merely for the purpose of explanation. The putting of questions does not of itself render a statement inadmissible but it is obvious that if questions are put by way of cross-examination, the voluntary nature of the statement is immediately lost.

In the present case the learned magistrate should have been satisfied that the accused did not volunteer to make a statement at all and the subsequent cross-examination should therefore never have arisen.

I agree that there was sufficient evidence to convict the accused apart from the confession and that the conviction should stand.

[ORIGINAL CIVIL JURISDICTION]

LOW CHENG SOON, LOW CHENG JEWAY, and LOW CHENG MEE (by their next friend HENG HAY ANG) and HENG HAY ANG.....Plaintiffs

v.

LOW CHIN PIOW and LOW PENG SONG.....Defendants

[SINGAPORE SUIT No. 699 of 1925]

Construction of Will—annuity for life—provision for the purchase of "Hio Theng" property—Court Interpreter's translation—prepetuity—superstitious uses—gift for the benefit of donees.

The testator by his wills directed his trustees after his death "(to let) my 'Huat Chi' Tan Ger Siam draw a sum of $500 monthly from Chop Yong Ngiap for expenses, children's expenses included; my first 'Chiap' Heng Hay Ang to draw a sum of $300 monthly from Chop Yong Lee for expenses and my second 'Chiap' Poon Kha Ang to draw a sum of $100 monthly from Chop Yong Lee for expenses."

Held, that the sum of $500 payable monthly to Tan Ger Siam was an annuity payable to her for life. Principle in *Thorp* v. *Owen*, 2 Hare 607, adopted.

The testator also directed his trustees "to draw $10,000 from the common funds (of my estate) and give it to my eldest son Low Chin Piow for the purchase of a "Hio Theng" property (a property acquired for the purpose of using the income derivable from it in defraying the expenses of ancestral worship) which shall be taken possession of (absolutely) by him."

Held, that, on the true construction of this clause, the legacy of $10,000 to Low Chin Piow was a trust for ancestral worship and the gift was invalid as tending to a perpetuity and also as being for superstitious uses.

The wills further directed the trustees "to draw $50,000 from the sums standing to the credit of my shares to pay the cost of building. My six sons shall share equally the occupation thereof when completed."

Held, that the direction to apply $50,000 towards the building of a house in China could be disregarded as the residuary legatees were absolutely entitled to the sum and could claim the gift without applying it to the purpose indicated.

This was a Summons taken out on the 16th February, 1931 by the defendants who were executors of the Wills of Low Peng Hong deceased who died on the 23rd January 1922.

The deceased left two Chinese Wills, which were duly proved on the 23rd June, 1922.

The testator left surviving him three wives Tan Ger Siam, Heng Hay Ang and Poon Kha Ang, six sons and one daughter.

Tan Ger Siam died on the 12th of September, 1926.

In accordance with the directions contained in the wills the executors caused to be erected a big house in China for use as a family house by the deceased's six sons. After the foundations of the house had been laid, the executors were forbidden, owing to the appointment of a Receiver, to draw further money from the funds standing to the credit of the Estate and the building operations had to be suspended.

The questions raised by the Summons for the determination of the Court, so far as they are material, are set out in the Judgment below.

Wilson, for Defendants, Executors and Trustees.

O'Connor, for Sons as Residuary Legatees.

Vaux, for Children of Testator by his wife Tan Ger Siam, and Low Heng Kian, etc.

Campbell, for Children of the Testator by his wife Heng Hay Ang.

da Silva, for Low Chin Piow in his individual capacity.

Cur. Ad. Vult.

TERRELL, J. This is a summons which has been taken out in an administration action to determine the construction of the will of Low Peng Hong deceased. The summons which has been adjourned into Court for argument is No. 208/31 and was issued on the 16th February, 1931.